

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 F. DORINE REYNOLDS,)
7 Plaintiff,) No. CV-09-0213-CI
8 v.) ORDER DENYING PLAINTIFF'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,) AND GRANTING DEFENDANT'S
11 Defendant.) MOTION FOR SUMMARY JUDGMENT

13 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.
14 Rec. 17, 19.) Attorney Maureen R. Rosette represents Dorine
15 Reynolds (Plaintiff); Special Assistant United States Attorney
16 Benjamin Groebner represents the Commissioner of Social Security
17 (Defendant). The parties have consented to proceed before a
18 magistrate judge. (Ct. Rec. 7.) After reviewing the administrative
19 record and briefs filed by the parties, the court **DENIES** Plaintiff's
20 Motion for Summary Judgment, and directs entry of judgment for
21 Defendant.

JURISDICTION

23 Plaintiff protectively filed for disability benefits (DIB) and
24 Supplemental Security Income (SSI) on January 5, 2005. (Tr. 54.)
25 She alleged disability due to colon cancer, severe depression,
26 extreme leg weakness, post-cataract surgery, post-traumatic stress
27 disorder (PTSD), and personality disorder. (Tr. 55.) She claimed

1 an onset date of March 1, 2002. (Tr. 73.) Plaintiff received DIB
 2 payments for a closed period of disability from March 1, 2002,
 3 through November 30, 2004. (Tr. 23, 933-34.) When the Commissioner
 4 determined she was capable of returning to her past work as a
 5 telemarketer as of December 2004, she requested an administrative
 6 hearing, alleging her disability continued after November 2004.
 7 (Tr. 23.) A hearing before administrative law judge (ALJ) Richard
 8 Say was held on June 6, 2007. (Tr. 928-49.) Plaintiff, who was
 9 represented by counsel, and vocational expert Deborah LaPoint (VE)
 10 testified. The ALJ denied benefits on August 13, 2007, and the
 11 Appeals Council denied review. (Tr. 7-9, 23-36.) The instant
 12 matter is before this court pursuant to 42 U.S.C. § 405(g).

13 **STANDARD OF REVIEW**

14 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 15 court set out the standard of review:

16 A district court's order upholding the Commissioner's
 17 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 18 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 19 Commissioner may be reversed only if it is not supported
 20 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 21 Substantial evidence is defined as being more than a mere
 22 scintilla, but less than a preponderance. *Id.* at 1098.
 23 Put another way, substantial evidence is such relevant
 24 evidence as a reasonable mind might accept as adequate to
 25 support a conclusion. *Richardson v. Perales*, 402 U.S.
 26 389, 401 (1971). If the evidence is susceptible to more
 27 than one rational interpretation, the court may not
 28 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
 25 resolving conflicts in medical testimony, and resolving
 26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 27 Cir. 1995). The ALJ's determinations of law are reviewed
 28 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

1 It is the role of the trier of fact, not this court, to resolve
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
3 supports more than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner. *Tackett*, 180
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
6 Nevertheless, a decision supported by substantial evidence will
7 still be set aside if the proper legal standards were not applied in
8 weighing the evidence and making the decision. *Brawner v. Secretary*
9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
10 there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
14 1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION

16 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
17 requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

8 The Commissioner has established a five-step sequential
9 evaluation process for determining whether a person is disabled. 20
10 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
11 137, 140-42 (1987). In steps one through four, the burden of proof
12 rests upon the claimant to establish a *prima facie* case of
13 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
14 920, 921 (9th Cir. 1971). This burden is met once a claimant
15 establishes that a physical or mental impairment prevents her from
16 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
17 416.920(a). At step five, the burden shifts to the Commissioner to
18 show that (1) the claimant can perform other substantial gainful
19 activity; and (2) a "significant number of jobs exist in the
20 national economy" which claimant can perform. 20 C.F.R. §§
21 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
22 1498 (9th Cir. 1984).

STATEMENT OF THE CASE

24 The facts of the case are set forth in detail in the transcript
25 of proceedings, and are briefly summarized here. At the time of the
26 hearing, Plaintiff was 60 years old, had completed high school and
27 attended community college and vocational school. (Tr. 61, 346.

1 651.) Plaintiff testified she was unmarried, homeless, and living
2 in a friend's house. (Tr. 935.) She had colon cancer surgery in
3 February 2004, and follow-up chemotherapy until November 2004. (Tr.
4 937.) She testified there had been no problems with cancer since
5 that time. (*Id.*) She also had past mental health treatment for
6 depression and PTSD symptoms. (Tr. 938.) Plaintiff has past work
7 experience as a telephone answering service operator, telemarketer,
8 receptionist, general clerk, fast food worker, and customer service
9 clerk. (Tr. 945-46.)

10 She testified she could not lift more than 10 pounds before it
11 started to hurt; she could sit in a chair for about an hour, stand
12 for less than 10 minutes, and walk about a block. (Tr. 939-40.)
13 She also testified climbing stairs and bending caused pain in her
14 back and legs; she needed to nap four or five times a day; and she
15 suffered aches and pains all of the time. (Tr. 940-41.) Plaintiff
16 reported she had problems with balance and got migraine headaches
17 three to five times a week that were quite severe and for which she
18 took medication. (Tr. 442-43.) She also reported she had extreme
19 memory loss since the chemotherapy. (Tr. 943.)

20 **ADMINISTRATIVE DECISION**

21 The ALJ found Plaintiff's date of last insured for DIB purposes
22 was December 31, 2009. (Tr. 25.) At step one, ALJ Say found
23 Plaintiff had not engaged in substantial gainful activity since
24 December 2004, the established date for the proceedings on review.
25 (Tr. 26.) At step two, he found Plaintiff had severe impairments of
26 "major depressive disorder, generalized anxiety disorder,
27 osteoporosis, and . . . status-post stage III colon cancer, in
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1 remission." (*Id.*) The ALJ determined Plaintiff's alleged leg pain
2 and migraine problems were not severe impairments under the Social
3 Security Act. (Tr. 29.) At step three, he found Plaintiff's
4 impairments, alone and in combination, did not meet or medically
5 equal one of the listed impairments in 20 C.F.R., Appendix 1,
6 Subpart P, Regulations No. 4 (Listings). (*Id.*) The ALJ then
7 summarized Plaintiff's testimony and concluded her statements
8 regarding symptoms were not generally credible and "likely
9 exaggerated." (Tr. 32-34.) At step four, he determined she could
10 perform sedentary work, including her past relevant work as a
11 telephone answering service operator, receptionist, and telephone
12 solicitor. (Tr. 35.) He found Plaintiff was not under a
13 "disability" as defined by the Social Security Act at any time from
14 December 1, 2004, through the date of his decision. (Tr. 36.)

15 ISSUES

16 The question is whether the ALJ's decision is supported by
17 substantial evidence and free of legal error. Plaintiff argues the
18 ALJ erred when he: (1) assessed her credibility and pain complaints;
19 (2) rejected the opinions of examining psychologists Mahlon Dalley,
20 Ph.D., and Gary Lauby, Ph.D., and psychiatric nurse practitioner
21 Mary Berg; and (3) failed to include all her limitations in the
22 final RFC. (Ct. Rec. 18 at 12-18.)

23 DISCUSSION

24 A. Credibility

25 When the ALJ finds a claimant's statements as to the severity
26 of impairments, pain and limitations are not credible, the ALJ must
27 make a credibility determination with findings sufficiently specific
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1 to permit the court to conclude the ALJ did not arbitrarily
 2 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
 3 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
 4 (9th Cir. 1991) (en banc). If there is no affirmative evidence that
 5 the claimant is malingering, the ALJ must provide "clear and
 6 convincing" reasons for rejecting the claimant's allegations
 7 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d
 8 715, 722 (9th Cir. 1998). The ALJ engages in a two-step analysis in
 9 deciding whether to admit a claimant's subjective symptom testimony.
 10 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

11 Under the first step, the ALJ must find the claimant has
 12 produced objective medical evidence of an underlying "impairment,"
 13 and that the impairment or combination of impairments "could
 14 reasonably be expected to produce pain or other symptoms." *Cotton*
 15 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). Thus, although an
 16 adjudicator may not reject a claimant's extreme symptom complaints
 17 solely on a lack of objective medical evidence, the medical evidence
 18 is a relevant factor to consider. *Social Security Ruling (SSR) 96-*
 19 *7p*. Once the *Cotton* test is met, the ALJ must evaluate the
 20 credibility of the claimant.

21 As ruled by the Ninth Circuit,

22 An ALJ cannot be required to believe every allegation of
 23 disabling pain, or else disability benefits would be
 24 available for the asking, a result plainly contrary to 42
 25 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
 26 the claimant introduces medical evidence showing that he
 27 has an ailment reasonably expected to produce some pain;
 28 many medical conditions produce pain not severe enough to
 preclude gainful employment.

27 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In assessing the

1 reliability of a claimant's allegations, the ALJ may apply ordinary
2 techniques of credibility evaluation, as well as consider the
3 following factors: the claimant's reputation for truthfulness;
4 inconsistencies either in her allegations of limitations or between
5 her statements and conduct; daily activities and work record; and
6 testimony from physicians and third parties concerning the nature,
7 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
8 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d 597 n.5.
9 The ALJ may also consider an unexplained failure to follow treatment
10 recommendations and testimony by the claimant "that appears less
11 than candid." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
12 2008). If the ALJ's credibility finding is supported by substantial
13 evidence in the record, "the court may not engage in
14 second-guessing." *Thomas*, 278 F.3d at 959; *Fair*, 885 F.2d at 604
15 ("credibility determinations are the province of the ALJ").

16 Here, the ALJ thoroughly summarized the medical evidence and
17 Plaintiff's testimony. (Tr. 30-34.) In finding her testimony and
18 written statements were not consistent or entirely credible, he
19 discounted the severity alleged, but did not totally reject her
20 statements. Rather, he found her capable only of sedentary work,
21 with several non-exertional limitations in mental and physical
22 functioning. (Tr. 30.) He specifically noted Plaintiff's report
23 of anxiety, mood swings, and severe depression for several years,
24 and mental health counseling in 2006. (Tr. 32.) Regarding her
25 physical condition, he noted her testimony that she was advised by
26 her doctor not to work until her colon cancer was under control; her
27 osteoporosis caused severe pain in her back and legs; she lacked
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1 stamina; and she needed to take one hour naps every couple of hours.
2 (*Id.*)

3 The ALJ then summarized activities of daily living reported by
4 Plaintiff in her application and at the hearing. (Tr. 32-33.) She
5 stated she could drive up to 30 minutes, perform minor household
6 chores, take care of her personal hygiene, as well as prepare meals,
7 do her laundry, and work at her craft hobbies during the day. She
8 reported spending as much time as possible with her daughter and
9 grandchildren, playing computer games, cooking, shopping, and
10 attending hockey games and church. (Tr. 30, 32.) Regarding work-
11 related limitations, she reported problems with lifting, standing,
12 walking, stair climbing, squatting and sitting, seeing,
13 understanding, memory, completing tasks, hearing, and concentrating.
14 She also stated weakness in her legs caused instability and loss of
15 coordination. (Tr. 32-33.) The ALJ also noted that in the 2005
16 appeal, Plaintiff reported worsening arthritis in her legs and
17 worsening anxiety attacks due to mental health therapy. (Tr. 33.)

18 ALJ Say found the objective medical evidence "could reasonably
19 be expected to produce the alleged symptoms," but Plaintiff's
20 statements regarding the intensity were exaggerated and not entirely
21 credible. (Tr. 33.) He then provided specific "clear and
22 convincing" reasons for discounting the severity of her allegations,
23 and properly referenced the record in support of his findings. (Tr.
24 33-34.) Specifically, he found Plaintiff's own testimony that she
25 could lift 10 pounds and sit for an hour at a time, as well as her
26 self-reported daily activities, supported the RFC for sedentary
27 work. (Tr. 33, 939-40, 944.) He noted inconsistencies in her
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1 statements regarding reasons for quitting work and evidence of
2 symptom exaggeration and non-compliance with treatment and
3 medication recommendations (over and above the reported intolerance
4 of some medications). (Tr. 33-34.) Failure to follow treatment
5 recommendations is a "clear and convincing" reason to discount a
6 claimant's complaints of severe functional limitations. *Tommasetti*,
7 533 F.3d at 1040. He also referenced statements from Plaintiff's
8 friend that Plaintiff played computer games (a sedentary activity),
9 liked to sew and do craft hobbies and attend social activities.
10 (Tr. 35, 118-25.)

11 Further, as found by the ALJ, psychological testing revealed
12 objective medical evidence of exaggeration of limitations and
13 symptoms. (Tr. 34, 645.) He also found treatment notes did not
14 indicate severe limitations due to headaches or osteoporosis. (Tr.
15 33; see, e.g., Tr. 821-22, 825.) The ALJ's credibility findings are
16 supported by substantial evidence and reflect a rational
17 interpretation of the evidence in its entirety. The ALJ did not err
18 in discounting the severe functional limitations claimed by
19 Plaintiff.

20 **B. Evaluation of Medical Evidence**

21 Plaintiff argues the ALJ erred when he discounted the reports
22 from examining psychologists and mental health providers that she
23 suffered severe mental limitations stemming from diagnosed PTSD and
24 depression. (Ct. Rec. 18 at 12.) She contends the medical evidence
25 shows she is significantly more impaired than the ALJ found in his
26 RFC determination.

27 During disability proceedings, the ALJ evaluates the medical
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1 evidence submitted and must explain the weight given to the opinions
2 of accepted medical sources in the record. Credibility is a factor
3 weighed in the evaluation. *Webb v. Barnhart*, 433 F.3d 683, 688 (9th
4 Cir. 2005).

5 The Regulations distinguish among the opinions of three types
6 of accepted medical sources: (1) sources who have treated the
7 claimant; (2) sources who have examined the claimant; and (3)
8 sources who have neither examined nor treated the claimant, but
9 express their opinion based upon a review of the claimant's medical
10 records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's
11 opinion carries more weight than an examining physician's, and an
12 examining physician's opinion carries more weight than a non-
13 examining reviewing or consulting physician's opinion. *Benecke v.*
14 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81
15 F.3d 821, 830 (9th Cir. 1995). The Commissioner must provide "clear
16 and convincing" reasons for rejecting the uncontradicted opinion of
17 a treating or examining physician." *Lester*, 81 F.3d at 830. If the
18 medical opinion is contradicted, it can only be rejected for
19 specific and legitimate reasons that are supported by substantial
20 evidence in the record. *Andrews*, 53 F.3d at 1043. The opinion of
21 a non-examining medical expert by itself cannot be considered
22 substantial evidence that supports the rejection of a treating or
23 examining physician. *Lester*, 81 F.3d at 831. Nurse practitioners
24 and mental health therapists acting independently are not
25 "acceptable medical sources" under the Regulations; however, as
26 "other sources," their opinions as to the effects of impairments on
27 a claimant's ability to work must be considered and the weight given
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1 explained. 20 C.F.R. § 404.1513(d); 416.913(d); SSR 06-03p.

2 Historically, the courts have recognized conflicting medical
3 evidence, the absence of regular medical treatment during the
4 alleged period of disability, and the lack of medical support for
5 doctors' reports based substantially on a claimant's subjective
6 complaints of pain as specific, legitimate reasons for disregarding
7 a treating or examining physician's opinion. *Flaten v. Secretary of*
8 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*,
9 885 F.2d at 604.

10 **1. Dr. Dalley and Associate**

11 Independent review of the record indicates Dr. Dalley's
12 associate, Brooke Sjostrom, M.S., conducted a psychological
13 assessment on December 22, 2003. (Tr. 167-75.) The report was
14 adopted by Dr. Dalley. (Tr. 171.) Objective test administered
15 included the Minnesota Multiphasic Personality Inventory (MMPI-2)
16 and Trails A and B testing. (Tr. 168-69.) At the time of testing,
17 Plaintiff was complaining of depression and colon cancer; she was
18 not receiving mental health treatment. (Tr. 170.) Based on the
19 results of the assessment, medication management of symptoms was
20 recommended, although the evaluator opined "[Plaintiff] is not
21 likely to benefit from traditional psychotherapy." (*Id.*) The
22 report did not include an explanation of this opinion.

23 The mental status exam revealed average mental control, average
24 fund of general information, and an ability to think abstractly.
25 Attentional abilities measured by the Trails A and B tests were
26 within normal range, and Plaintiff reported independent living
27 skills, sleep disturbances, and "occasional difficulty completing
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1 daily household chores due to lack of energy." (Tr. 168.) The
2 evaluator indicated MMPI-2 results were valid, and revealed a
3 profile in which "exaggeration of both the extent and severity of
4 actual physical symptoms" was considered likely. (Tr. 169.) Major
5 depressive disorder (recurrent, moderate), and undifferentiated
6 somatoform disorder were diagnosed. (Tr. 170.) Marked functional
7 limitations were assessed in Plaintiff's ability to relate
8 appropriately to co-workers and supervisors, and to respond
9 appropriately to the expectations and pressures of a normal work
10 setting. (Tr. 174.) Plaintiff received disability benefits until
11 November 2004, based on impairments due to colon cancer and
12 treatment. Although the ALJ discussed this evidence in his decision
13 (Tr. 26), he was not required to reject or credit the functional
14 limitations assessed, as they are not probative to the period at
15 issue in these proceedings. *Vincent v. Heckler*, 739 F.2d 1393,
16 1394-95 (9th Cir. 1984). However, the ALJ's discussion of
17 Plaintiff's self-report, the evaluator's observations regarding
18 Plaintiff's complaints, and objective test results showing symptom
19 exaggeration creates reasonable inferences that support the ALJ's
20 credibility findings. (Tr. 26.) *Magallanes v. Bowen*, 881 F.2d 747,
21 755 (9th Cir. 1989). ALJ Say did not err in his consideration of Dr.
22 Dalley's and Ms. Sjostrom's report.

23 **2. Dr. Lauby**

24 The ALJ also summarized Dr. Lauby's evaluations dated August
25 2004 and August 2005. (Tr. 26-27, 345-53, 639-46.) As noted by the
26 ALJ, Dr. Lauby assessed the same severe limitations in August 2005
27 as noted in his 2004 assessment. At step two of the sequential
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1 evaluation, the ALJ summarized Plaintiff's self-report to Dr. Lauby
2 of depression, anxiety, and multiple physical problems, and Dr.
3 Lauby's observation of apparent exaggeration of symptoms and
4 inconsistent responses to testing items. (Tr. 26, 27.) The record
5 supports the ALJ's findings that Plaintiff was articulate and showed
6 no signs of obvious physical distress. It also shows Dr. Lauby
7 noted a lack of fund of information that was inconsistent with
8 Plaintiff's level of education above average mental control. (Tr.
9 26, 347-48.) In 2004, Dr. Lauby opined specifically, "Her validity
10 scores, taken together, suggest that she responded inconsistently to
11 inventory items on multiple validity scales, thereby precluding
12 presentation of any reliable interpretation of her clinical scale
13 scores." (Tr. 348.)

14 In 2005, Dr. Lauby administered a new MMPI-2 and also reported
15 Plaintiff's scores showed that her symptoms may have been "seriously
16 exaggerated." He determined a reliable interpretation of clinical
17 scale scores could not be provided. (Tr. 645.)

18 At step four, the ALJ gave specific, legitimate reasons for
19 giving little weight to the severe limitations noted by Dr. Lauby in
20 the 2005 evaluation. (Tr. 34.) As found by the ALJ, and supported
21 by the evidence discussed above, Dr. Lauby found test results
22 invalid and indicative of exaggeration of symptoms. (Tr. 645.)
23 Therefore, there is no reliable evidence to support findings of
24 severe mental limitations. In addition, the ALJ found Dr. Lauby's
25 severe limitations in dealing with co-workers were inconsistent with
26 Plaintiff's self-report, and the reports of friends and family, that
27 she had few problems getting along with others. (Tr. 34, 83, 121.)
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1 It is noted on independent review that Dr. Lauby cited Plaintiff's
2 social isolations as "reason for special concern." However, the
3 record indicates Plaintiff socializes regularly with friends and
4 family and attends social events. (Tr. 95-97, 105.) The ALJ gave
5 sufficient "clear and convincing" reasons supported by the record to
6 discount Dr. Lauby's 2005 assessment of disabling functional
7 limitations. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1044-45 (9th
8 Cir. 2007).

9 **3. Nurse Practitioner Berg**

10 Citing *Gomez v. Chater*, 74 F.3d 967 (9th Cir. 1996), Plaintiff
11 argues Ms. Berg's opinions should be evaluated under the standard of
12 a treating physician because she is part of an "interdisciplinary
13 team." (Ct. Rec. 18 at 12.) Under *Gomez*, the opinions of a nurse
14 practitioner were given the weight of a treating medical source
15 because of the nurse's close supervision by and ongoing consultation
16 with a medical doctor. *Gomez*, 74 F.3d at 971. However, the Social
17 Security Regulation relied upon in the *Gomez* ruling (20 C.F.R. §
18 416.913(a)(6)) has been amended and no longer includes
19 "interdisciplinary team," under the definition of "acceptable
20 medical sources." *See* 20 C.F.R. §§ 404.1513(a)(1-5), 416.913(a)(1-
21 5). Therefore, *Gomez* is not apposite here.

22 In 2006, the Social Security Administration recognized the
23 growth of managed health care in this country and the increased
24 reliance on "other medical sources," such as nurse practitioners and
25 physician assistants for treatment and evaluation functions
26 previously handled by medical doctors and licensed psychologists.
27 *SSR 06-03p*. In his Ruling, the Commissioner advises adjudicators
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1 that opinions of "other medical sources" (i.e., those who are not
2 "acceptable medical sources" under the Regulations) may be given
3 more weight than a treating physician if certain factors are
4 present. As stated in the Ruling, "Each case must be adjudicated on
5 its own merits based on a consideration of the probative value of
6 the opinions and a weighing of all the evidence in that particular
7 case." *Id.* Among the factors considered in assigning weight and/or
8 rejecting "other medical source" opinions is how often the source
9 has seen the individual, and if her opinion has better supporting
10 evidence than a conflicting acceptable medical source opinion. *Id.*

11 The record shows Plaintiff was referred to Spokane Mental
12 Health (SMH) in February 2005, for mental health care. Ms. Berg
13 conducted the initial assessment at the request of Dr. Lauby and an
14 agency representative. (Tr. 648-55.) Ms. Berg is a psychiatric
15 nurse practitioner, i.e., an "other medical source," whose opinions
16 must be addressed by the ALJ. *SSR 06-03p.* There is no evidence
17 that Ms. Berg worked closely with an acceptable medical source at
18 SMH, as claimed by Plaintiff. Other than a notation that Dr.
19 Chellbarger was an "Assessment Team Leader" in January 2005, there
20 is no indication Ms. Berg conferred with or was supervised by Dr.
21 Chellbarger; there is no evidence that Dr. Chellbarger had any
22 personal contact with Plaintiff or reviewed and signed Ms. Berg's
23 report. (Tr. 633.) Therefore, even assuming *Gomez* applies, Ms. Berg
24 does not qualify as part of an "interdisciplinary team." Further,
25 there is no evidence that Ms. Berg had a treatment relationship with
26 Plaintiff or had personal knowledge of Plaintiff's functioning over
27 time. It appears she saw Plaintiff one time at SMH for the initial
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1 assessment, which was based on Plaintiff's self-report and a review
 2 of Dr. Lauby's August 2005 test results. (Tr. 652-53.) Therefore,
 3 her opinions are not evaluated under the "treating physician"
 4 standard and do not warrant the weight given to an acceptable
 5 medical source. SSR 06-03p.

6 Nonetheless, the ALJ is obliged to consider Ms. Berg's opinions
 7 as to how Plaintiff's impairments affect her functional abilities.¹
 8 If the ALJ rejects the opinions, his reasoning must be specific and
 9 "germane" to Ms. Berg. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th
 10 Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
 11 1993)). The ALJ properly gave little weight to Ms. Berg's assessment
 12 because she specifically noted inconsistencies in Plaintiff's report
 13 of facts and questioned the validity of Plaintiff's scores. (Tr.
 14 34.) This is a specific, germane reason sufficient to discount
 15 other source opinions. Further, the reasoning is supported by Ms.
 16 Berg's own report and SMH treatment notes.

17 Referencing Dr. Lauby's test results, Ms. Berg cited objective
 18 medical evidence of symptom exaggeration. (Tr. 652.) She also
 19 observed the validity of Plaintiff's impressions "is questionable,"
 20 and referenced inconsistencies in Plaintiff's self report. (Tr.
 21 653.) Ms. Berg also noted Plaintiff's inconsistency in taking

22 ¹ Treatment notes indicate Plaintiff participated in counseling
 23 at Spokane Mental Health with a variety of mental health therapists
 24 individually and in group sessions. (Tr. 712-800.) The notes do
 25 not reflect the opinions of Ms. Berg. The ALJ did, however,
 26 properly considered those observations as directed by SSR 06-03p.
 27 (Tr. 34, see also Tr. 647.)

1 medication, and opined non-compliance likely contributed to the
2 severity of her depression and anxiety. (Tr. 650, 653.) She
3 recommended a consistent regime of anti-depressant medication to
4 treat both depression and anxiety. (Tr. 653, 655.) When discharged
5 from SMH in July 2006, Plaintiff reported feeling much better with
6 treatment, her depression was much less, she was socializing, and
7 stated she was "not interested in employment." (Tr. 647.) Thus,
8 consistent with Ms. Berg's observation, the record shows that once
9 Plaintiff complied with prescribed medication and treatment, her
10 mental condition improved significantly within five months.

11 Although Ms. Berg formally diagnosed PTSD, depressive disorder,
12 generalized anxiety disorder and personality disorder, these
13 diagnoses are given little weight because, as properly found by the
14 ALJ, Ms. Berg is not an acceptable medical source under the
15 Regulations, and therefore is not qualified to diagnose a disabling
16 impairment. 20 C.F.R. §§ 404.1527(d), .1513(d), 416.927(d), .913(d).
17 The ALJ did not err in his consideration of Ms. Berg's report. Her
18 opinions were properly evaluated and the weight given is reflected
19 in the final RFC, which as discussed below, is supported by
20 substantial evidence.

21 **C. RFC Determination**

22 The RFC determination represents the most a claimant can still
23 do despite his physical and mental limitations. 20 C.F.R. §§
24 404.1545, 416.945. The RFC assessment is not a "medical issue"
25 under the Regulations; it is an administrative finding based on all
26 relevant evidence in the record, not just medical evidence. *Id.*
27 The final determination regarding a claimant's ability to perform
28

1 basic work is the sole responsibility of the Commissioner. 20
2 C.F.R. § 416.946; SSR 96-5p. No special significance is to be given
3 to a medical source opinion on issues reserved to the Commissioner.
4 20 C.F.R. §§ 404.1527(e), 416.927(e).

5 Although the ALJ gave little weight to the severe functional
6 limitations assessed by Dr. Lauby in the form report accompanying
7 the narrative evaluation, he did not totally reject Dr. Lauby's
8 narrative findings. ALJ Say's RFC determination reflects a
9 reasonable interpretation of the medical evidence in its entirety as
10 well as Plaintiff's credible testimony and credible lay witness
11 statements. As discussed above, the ALJ properly rejected medical
12 opinions of severe limitations that precluded work and gave specific
13 "clear and convincing" reasons for discounting Plaintiff's
14 allegations of disabling symptoms. Although the court reviews these
15 proceedings *de novo*, where, as here, substantial evidence supports
16 the ALJ's determination and there is no legal error, the
17 Commissioner's decision must be affirmed. Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
20 **DENIED**;

21 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is
22 **GRANTED**;

23 The District Court Executive is directed to file this Order and
24 provide a copy to counsel for Plaintiff and Defendant. Judgment
25 shall be entered for Defendant, and the file shall be **CLOSED**.

26 DATED September 3, 2010.

27

S/ CYNTHIA IMBROGNO
28 UNITED STATES MAGISTRATE JUDGE